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Supreme Court of the United States,

OCTOBER TERM 1935.

No. 804 28

KVOS, INC., a corporation,
Petitioner,

vs.

THE ASSOCIATED PRESS, a corporation,
Respondent.

BRIEF OF RESPONDENT OPPOSING ISSUANCE OF WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH COURT.

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THE BALLOU PRESS NEW YORK

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Supreme Court of the United States.

OCTOBER TERM 1935.

KVOS, INC., a corporation,
Petitioner,

against

THE ASSOCIATED PRESS, a corporation,
Respondent.

RESPONDENT'S BRIEF.

Respondent submits this brief opposing issuance of a writ of certiorari herein to the Circuit Court of Appeals of the Ninth Circuit, to review its decree reversing the decree of the United States District Court, for the Western District of Washington, Northern Division.

The petition involves two motions: (1) a motion by defendant-petitioner to dismiss the bill of complaint, which resulted in a decree of dismissal, with prejudice, by the District Court, and, upon appeal, a reversal by the Circuit Court of Appeals; and (2) a motion by complainant-respondent for a preliminary injunction, which resulted in an order of the District Court denying the motion, and, upon appeal, an order of the Circuit Court directing the District Court to grant the preliminary injunction, and an order of the District Court pursuant thereto.

In its petition and supporting brief, the petitioner repeatedly overlooks the elementary fact that its motion to dismiss is directed solely to the allegations of the complaint and is not affected by the affidavits and findings, which are to be considered only upon the motion for the preliminary injunction. We gather that the petitioner intended, in a general way, to confine its petition to the questions arising out of

the motion to dismiss; however, since the argument seems to escape these seemingly intended bounds at many points, we shall include a brief statement with respect to the motion for a preliminary injunction.

Statement of the Case.

The bill of complaint alleges that the complainant, The Associated Press, is a New York membership corporation with more than 1200 members, each owning or representing a daily newspaper in the United States; that the complainant is engaged, for the benefit of its members, in gathering news from all over the world by its own instrumentalities, by exchange with its members, and by interchange with or purchase from other news agencies; that the cost of gathering news and distributing the same to its members, amounting to many millions of dollars a year, is assessed upon its members; and that the general news gathered by complainant as well as the local news gathered by its members, is by mutual agreements, set forth in the by-laws, restricted to the members for the purposes of regular publication by them (Tr. pp. 2 to 6).

The bill further alleges that the defendant KVOS, Inc., is a corporation of the State of Washington, engaged at Bellingham, Washington, in the business of radio broadcasting for profit, the profit being derived by sale of time for advertising purposes; that during three half hour periods daily, the defendant broadcasts a so-called "Newspaper of the Air", in the course of which, interspersed with paid advertising, it systematically reads, verbatim or in slightly rearranged form, the most important and interesting items of news obtained from the latest editions of three newspapers which are published by members of the complainant Associated Press, namely, The Bellingham Herald, the Seattle Post-Intelligencer, and The Seattle Daily Times; and that the news so "pirated" by the defendant is news gathered by the complainant and by its members within the terms of the membership agreements above mentioned.

The bill of complaint further alleges that the defendant and several members of the complainant serve much the same territory in the dissemination of such news the territory served by defendant extending "for a radius of seventy-five to one hundred miles from the said City of Bellingham"; that the defendant and the members of the complainant disseminate news in order to increase the value of their respective mediums for advertising purposes, the defendant making its profit out of the sale of time to advertisers and the members of complainant making their profit largely out of the sale of space to advertisers; that the defendant, by pirating news so gathered by complainant and its members and broadcasting the same, makes the news known to the general public several hours in advance of the time when newspapers published by members of complainant can reach their actual or potential subscribers; that this practice of defendant is an appropriation of the product of the industry of complainant and its members and constitutes unfair competition; that it works a direct and irreparable injury to complainant and its members; and that the complainant has frequently requested the defendant to desist from the said practice, but that defendant has refused to desist and intends to continue the practice. The bill of complaint thereupon asks relief by temporary and permanent injunction (Tr. pp. 16-17).

The bill of complaint not only alleges the jurisdictional diversity of citizenship as above noted, but also alleges that the amount involved exceeds $3,000 (Tr. p. 3).

The complainant moved, by show cause order containing a temporary restraining order, for a temporary injunction (Tr. pp. 37 to 40); and the portion of the Record particularly relating thereto embraces Tr. pp. 18-41, 45-465. The defendant moved to dismiss the bill of complaint on the ground that it does not recite facts sufficient to entitle complainant to the relief prayed for and on other detailed grounds (Tr. pp. 42 to 44). The defendant's motion to dismiss was granted (with prejudice) and, as a necessary consequence,

the complainant's motion for a preliminary injunction was denied by a decree and order of the District Court (Tr. pp. 516 to 518). The Circuit Court of Appeals reversed the District Court, reinstating the bill of complaint and directing the issuance of a preliminary injunction. The case is reported under the title *The Associated Press* v. *KVOS, Inc.* in 9 F. Supp. 279 (Bowen, D. J.) and 80 F. (2d) 575 (Wilbur, Denman and Mathews, C. JJ.; Denman, J., writing).

In seeking a review of this determination of the Circuit Court of Appeals, the defendant-petitioner contends (I) that the requisite jurisdictional amount is not shown to be involved; (II) that the requisite diversity of citizenship is not shown, since the complainant, The Associated Press, is not the real party in interest, and the joinder of the real parties in interest would have destroyed diversity of citizenship; (III) that the complaint does not state facts sufficient to constitute a cause of action; and (IV) that the complainant failed to make out a case for a preliminary injunction. In opposing the petition, we shall take up these contentions in order.

It may be remarked at the outset that we think all of the important principles involved in the present case were settled in *International News Service* v. *Associated Press*, 248 U. S. 215, that the Circuit Court of Appeals correctly followed and applied the decision in that case, and that there is therefore no occasion for the issuance of a writ of certiorari.

POINT I.

The Bill of Complaint adequately alleges that the requisite jurisdictional amount is involved.

The complaint alleges that more than $3,000. is involved in the controversy (Tr. p. 3). This allegation is controlling for the purpose of the motion to dismiss the bill.

> Opinion of District Court herein, 9 F. Supp. 279, 284;
>
> Montgomery, Federal Jurisdiction & Procedure, 3 Ed. § § 207, 210.

Petitioner suggests that the lack of the requisite jurisdictional amount is shown by the trifling amount of pirating disclosed in the affidavits submitted on the motion for a preliminary injunction. Insofar as this suggestion bears on that motion, we shall deal with it under Point IV. It is sufficient under the present point to note that the affidavits cannot be considered upon the motion to dismiss the bill.

Petitioner further suggests that the lack of the requisite jurisdictional amount appears upon the face of the bill since the complainant's business is shown to be of a non-profit nature. It is true that The Associated Press makes no profit. It is a membership corporation which meets its expenses, by assessments upon its members. But the fact that a corporation does not make a profit does not mean that it cannot be damaged. Furthermore, as stated under the succeeding point, The Associated Press is a proper party to sue on behalf of its members; and it is apparent that the interest of the members, properly to be protected in this action, may exceed $3,000 as alleged in the complaint. The real interest of the respondent and its members as outlined in the complaint is unquestionably in excess of $3,000 under the principle that the jurdisdictional amount is to be tested, in such

a case as the present, by the value of the right sought to be protected and not by the immediate pecuniary amount involved.

Opinion of C. C. A. herein, 80 F. (2) 575, 579;
Montgomery, Federal Jurisdiction & Procedure, § 208 (and cases cited);
Bitterman v. *Louisville & N. R. R.*, 207 U. S. 205, 225;
Local No. 7 of Bricklayers Union v. *Bowen*, 278 F. 271;
Herbert v. *Rainey*, 54 F. 248;
King v. *Kansas City Police Relief Association*, 60 F. (2d) 547.

It is further to be noted that the non-profit nature of the respondent's business was set forth in *International News Service* v. *Associated Press*, 248 U. S. 215, in substantially the same terms as in the present case; and this Court nevertheless assumed without question that the requisite jurisdictional amount was there involved.

POINT II.

The Bill of Complaint adequately discloses the respondent, The Associated Press, as the proper party to bring this action.

The petitioner argues that The Associated Press is not the real party in interest and that a joinder of the real parties in interest would destroy the requisite diversity of citizenship.

The petitioner bases this argument primarily on the theory that The Associated Press cannot have an interest in the controversy since it operates without profit, merely assessing the cost of its operations upon its members. In view of the structure of The Associated Press and its relationship to its members, we think a court of equity will recognize that it is

fundamentally a business enterprise. Under its by-laws all news furnished to members or gathered by members belongs to The Associated Press. It is designed to maintain a trained and efficient organization for the gathering of news and, to this end, to derive the necessary income to employ and adequately remunerate a staff of experts. For all practical purposes it is in obvious and keen competition with other news gathering agencies as was recognized by the Supreme Court in the *International News Service* case (248 U. S. 215), in which case the record showed The Associated Press's method of operation precisely as alleged in the present bill of complaint. Its members are its customers, and there would be no point in collecting profits from them in order to return the profits as dividends.

Quite aside from the respondent's interest as a business concern, the respondent is a proper party to sue on behalf of the various newspaper members. When the question is one of common or general interest to many persons constituting a class, one or more may sue for the whole (Fed. Eq. Rule No. 38, Hopkins 6 ed., p. 226). It is well settled that classes of persons similarly situated may be represented by an association or organization such as the respondent herein (*Merchants Association* v. *United States*, 231 Fed. 292; Foster's Fed. Pr., 6 ed., sec. 114). In the *International News Service* case the court expressly held that the "complainant is a proper party to conduct the suit as representing their (the members') interest * * *" (248 U. S. 215, 233).

The petitioner argues, however, that the present case involves no general interest on the part of similarly situated parties, but concerns only one or at the most three newspapers (Petition, pp. 8, 17); and that these papers are necessary parties if not the only proper parties complainant. While they might have been proper parties they are not necessary parties since the case does not deal with any right or damage which is limited to the three newspapers. The complaint alleges that numerous other members of respondent within the territory in question are injured (Tr., p. 13).

Furthermore, in showing the general operation and structure of The Associated Press, the complaint clearly shows that its more than 1200 members (Tr. p. 4) are interested in the protection of The Associated Press as their mutual agency for the competitive collection and distribution of news.

Both the District Court and the Circuit Court of Appeals held that there was no defect of parties complainant in this case.

> Opinion of District Court, 9 F. Supp. 279, 284;
> Opinion of C. C. A., 80 Fed. (2d) 575, 579-580.

As pointed out in the latter opinion, the question here under consideration has been decided adversely to the petitioner in the *International News Service* case (248 U. S. 215).

POINT III.

The Bill of Complaint states facts sufficient to constitute a cause of action for a permanent injunction; and the Circuit Court of Appeals properly reversed the decree of the District Court dismissing the bill.

No distinction of importance can be drawn between the present case and *International News Service* v. *The Associated Press,* 248 U. S. 215. The petitioner attempts to meet the *International News Service* case partly by dwelling on various differences, of no importance in principle, between newspapers and broadcasts, partly by stubborn adherence to the dissenting views rejected in the prevailing opinion of this Court, and partly by an unfounded and repetitious misstatement of the holding of the majority of this Court. Furthermore, while we cannot find that petitioner has anywhere stated what this Court did hold, we gather that it does not agree with the holding.

In the present case, the allegation is that defendant-petitioner pirates The Associated Press news by taking the same from newspapers, published by members of The Associated Press, after publication but before distribution in ordinary course, and by disseminating the same by radio broadcasts. The petitioner repeatedly asserts that, accordingly, it obtained the news rightfully; and that this fact distinguishes the present case from *International News Service* case in which, petitioner repeatedly asserts, the news was obtained wrongfully, namely, by bribery and like methods. The simplest way to dispose of this reckless misstatement is to quote from the opinion of this Court (248 U. S. 215, 231):

> "The bill was filed to restrain the pirating of complainant's news by defendant in three ways: First, by bribing employees of newspapers published by complainant's members to furnish Associated Press news to defendant before publication, for transmission by telegraph and telephone to defendant's clients for publication by them; Second, by inducing Associated Press members to violate its by-laws and permit defendant to obtain news before publication: and Third, by copying news from bulletin boards and from early editions of complainant's newspapers and selling this, either bodily or after rewriting it, to defendant's customers."

After pointing out that the matters arising under the first and second heads (bribery and inducing violations of by-laws) had been disposed of in the courts below (by the granting of a preliminary injunction) this Court said (p. 232):

> "The only matter that has been argued before us is whether defendant may lawfully be restrained from appropriating news taken from bulletins issued by complainant or any of its members, or from newspapers published by them, for the purpose of selling it to defendant's clients. * * * As presented in argument, these questions are: 1. Whether there is any property in news; 2. Whether, if there be property in news collected for the purpose of being published, it survives the instant of its publication in the first newspaper to which it is

communicated by the news-gatherer; and 3. Whether defendant's admitted course of conduct in appropriating for commercial use matter taken from bulletins or early editions of Associated Press publications constitutes unfair competition in trade."

It was upon these questions that this Court affirmed the order of the Circuit Court of Appeals granting a preliminary injunction under the third head (the taking of news from bulletins and published papers). Thus, there was no distinction whatever, in the manner of obtaining news, between the *International News Service* case (so far as this Court was called upon to decide) and the present case. In each case the news was obtained rightfully. In each case the point is that the defendant *wrongfully used* the news although *rightfully obtained.*

A. The Complaint States a Cause of Action Based on Defendant's Unfair Competition in the Advertising and News Fields.

For the purposes of a motion to dismiss, the allegations of the bill must of course be taken as true. The petitioner, without any regard to whether its argument is addressed to the motion to dismiss or to the motion for a preliminary injunction, volunteers the statement that the petitioner's station is a small 100-Watt station with a sending radius of only five miles (Petition, p. 1, and elsewhere); that on this account it could not compete with any of the member newspapers of The Associated Press, except the Bellingham Herald, and that even the Circuit Court of Appeals found that the news items taken from this paper were "but twelve in number over the course of a year" (Petition, p. 17).

As will later appear, these volunteered statements have no foundation in the record, even as applied to the motion for a preliminary injunction. Much less can they be considered upon the motion to dismiss. The allegation of the complaint is that the territory served by the petitioner's sta-

tion extends for a radius of 75 to 100 miles from the City of Bellingham, and that numerous member newspapers of The Associated Press, including the three specifically mentioned in the complaint, serve the same territory to a greater or lesser extent (Tr. p. 13).

Regarding The Associated Press and its member newspapers as identical so far as the right to injunctive relief is concerned, the allegations of the complaint show that it and the defendant are engaged in competition in the advertising field. The complainant's members and the defendant each sell advertising facilities to advertisers, the complainant's members selling space in their advertising mediums, while the defendant sells time on its advertising medium. In the case of each business, the advertising medium obtains a substantial part of its advertisement-carrying power from news. In the conduct of its advertising business, the defendant appropriates or pirates and broadcasts news gathered by the complainant and its members, and thereby impairs the carrying power of the advertising mediums of the complainant's members.

The District Court held (Tr. pp. 484 to 485) that no competition exists between newspaper publishers and broadcasting sfations, because the newspaper publisher sells his paper to the public at a nominal price while the broadcaster charges the public nothing. We think this position overlooked the plain facts of the case, and proceeded upon an unduly narrow interpretation of the word "competition". In reversing the District Court, the Circuit Court of Appeals effectively disposed of the position thus taken by the lower Court (80 F. (2d) 575, 581-582).

It is a well recognized fact, alleged in the bill (Tr. p. 9), that newspapers derive the larger part of their revenue from advertising rather than from the sale of their papers to the public. A large circulation is essential in order to attract advertisers; and, in order to obtain a large circulation, attractive and complete news reports are vital.

In the same way, in the radio field, the broadcaster receives his revenue from the sale of advertising time or sponsored programs; and in order to attract advertisers it is essential to have a large listening audience. It is a matter of public knowledge that the broadcaster, in addition to the sponsored programs for which he is paid, often broadcasts, without allocated charge, some feature (whether news or otherwise) which he thinks will appeal to the public.

Thus the newspaper publisher and the broadcaster are in direct commercial competition with each other in their endeavor to attract and retain paid advertising by widening the circle of those whom they reach.

It is merely viewing the situation from another angle to say that The Associated Press members and the petitioner are likewise competing in the business of disseminating news. In each case the dissemination of news is an integral part of the business of the respective parties, whether the newspaper or the broadcasting business. The newspaper disseminates news as part of a commercial enterprise; and obtains a return by charging its advertisers. In the conduct of its news disseminating business the defendant appropriates or pirates and broadcasts news gathered by the complainant and its members and thereby competes unfairly and directly with the complainant members.

In *Associated Press* v. *Sioux Falls Broadcast Association* (U. S. D. C. for Dist of S. D. March 14, 1933, Elliott, District Judge) the facts were on all fours with those of the present case and the Court there granted such relief as is sought herein.*

In *International News Service* v. *Associated Press* (248 U. S. 215), The Associated Press was granted an injunction

* No opinion was rendered in the *Sioux Falls* case nor is the case reported, but copies of the findings and conclusions were submitted to both lower courts herein on argument. A similar case, likewise unreported, is *New Orleans Times Picayune, et al.* v. *Uhalt* (N. Y. Times, June 30, 1933) in which plaintiffs were granted a twenty-four hour injunction against use of news from their newspapers for defendant's broadcasting purposes.

similar to that sought in the present case. As heretofore stated we think that case is not distinguishable in principle from the present case. There as here the complainant was The Associated Press. Its status as a membership corporation and its relation to its members were set forth as in the present case. The defendant International News Service was likewise engaged in the gathering of news and the distribution thereof to newspapers; but the International News Service was not a membership corporation, and operated for a profit on its own account by charging its subscribers for its service and not by assessing members as did The Associated Press. The case involved the piracy of news by the taking of news items from papers of Associated Press members upon first publication and by the commercial distribution of such items.

On the question of unfair competition, this Court there said (248 U. S. 215, 240-241):

> "The contention that the news is abandoned to the public for all purposes when published in the first newspaper is untenable. Abandonment is a question of intent, and the entire organization of the Associated Press negatives such a purpose. The cost of the service would be prohibitive if the reward were to be so limited. * * * Their effect (complainant's by-laws) is that publication by each member must be deemed not by any means an abandonment of the news to the world for any and all purposes, but a publication for limited purposes; for the benefit of the readers of the bulletin or the newspaper as such; not for the purpose of making merchandise of it as news, with the result of depriving complainant's other members of their reasonable opportunity to obtain just returns for their expenditures."

Referring to the news, this Court said (p. 240):

> "* * * It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience."

We think it is apparent that the advertising and news disseminating phases of the respective businesses (newspaper and broadcasting) cannot be divorced, that the defendant broadcasts news for profit, even though it obtains its return indirectly from advertisers, and that accordingly the complainant's members and defendant are competing commercially in the dissemination of news. As a statement of fact, we think the foregoing is too obvious for argument. Insofar as legal questions are involved, the following cases support the proposition that petitioner was operating for a profit in its news broadcasts even though it collected from others than the listeners.

Herbert v. *Shanley Co.* (1917), 242 U. S. 591;
Buck v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191;
Remick v. *American Automobile Accessories Co.*, 5 F. (2d) 411 (Cert. denied 269 U. S. 556);
Remick v. *Bamberger & Co.*, 291 F. 776;
Sarpy v. *Holland* (1908), 2 Ch. 198.

In the *Shanley* case, this Court held that the defendant, in employing an orchestra to render a musical composition in its restaurant without any specific charge to the customers, was performing the composition "for profit" within the meaning of the copyright statute. This Court said (pp. 594, 595):

> "The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important * * * If music did not pay it would be given up. If it pays it pays out of the public pocket. Whether it pays or not the purpose of employing it is profit and that is enough."

Needless to say, the petitioner misconceives the applicability of this case in distinguishing it as a copyright case (Brief, pp. 30-31). It is cited merely as showing by analogy that

petitioner's news broadcasts are an integral part of their commercial enterprise and, in the sense here pertinent, cannot be regarded as gratuitous. Upon the principle of the *Shanley* and other like cases above cited, we think it is clear that the petitioner is in competition with The Associated Press and its members, even though the petitioner finds itself unable to make any charge directly against its listeners. The Circuit Court of Appeals so held, and we think there is no occasion for a review of its decision.

The petitioner assumes (incorrectly, as pointed out under subhead C, *infra*) that the complaint cannot be upheld unless it makes out a case of actual competition. On this assumption, the petitioner argues that the competition must be substantial in the sense and degree pertinent in cases arising under the Federal Trade Commission and the Clayton Acts.

We have already referred to the fact that the petitioner asserts, utterly without foundation, that its station is effective only within a radius of five miles; and to the fact that the complaint states the radius as from seventy-five to one hundred miles.

The petitioner expands its general effort to minimize the competition by arguing (Petition, pp. 13, 14, 16) that it consumes only ten percent of its time in news broadcasts; and thereupon attempts to draw an analogy from Federal Trade Commission and Clayton Act cases. Petitioner overlooks the distinction between the general law of unfair competition as between individuals and the statutory law in the public interest under which the Commission acts—a distinction which the courts have repeatedly emphasized.

> 15 U. S. C. A. sec. 45, and notes particularly p. 262.
> *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495;
> *Raladam Co.* v. *Federal Trade Commission,* 283 U. S. 643 (affirming 42 F. (2d) 430).

In *International Shoe Company* v. *Federal Trade Commission* (280 U. S. 291) (Petition pp. 9, 16) the question

arose under the Clayton Act as to whether the Shoe Company's acquisition of the stock of another Company was such as "to substantially lessen competition" within the prohibition of that act. The percentage of competition relevant under the Act has nothing to do with the question of private rights involved in the present case.

In a case of unfair competition, the extent of defendant's business has no bearing. Thus complainants' right to enjoin infringement of their trade-names is unaffected by the amount of business done by defendant. (*Garcia* v. *Garcia*, D. C. Wisconsin, 197 F. 637 at 641).

B. The Complaint States a Cause of Action Based on Defendant's Infringement of a Property Right in News.

The petitioner repeatedly states in substance that this Court, in the *International News Service* case, *supra*, held that neither The Associated Press nor any of its members had any property right in news reports after the instant of their first publication. The assertion would seem to be specifically controverted by the language of this Court. As between the parties engaged in the commercial use of fresh news, this Court stated that news as news "must be regarded as quasi property, irrespective of the rights of either as against the public" (pp. 236-273). Again this Court refers to news as "salable material" and, as such, susceptible of mis-appropriation (p. 239). Again, referring to news, this Court says (p. 240):

> "It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience."

In view of this language, it is scarcely necessary to deal with petitioner's volatile argument that "in order to sustain the Circuit Court's decision this Court is called upon to affirm a general and absolute property right in published and distributed news, as such". (Brief, p. 21).

It is perhaps desirable, at this point to comment briefly on several other cases cited by petitioner as holding that news, as such, is not subject to protection.

While "news", as such, is not subject to copyright, its "piracy" from the gatherer will be enjoined until its dissemination by that gatherer. *Davies* v. *Bowes* (209 F. 53) cited by petitioner (Brief p. 53) involved only a question of whether a piece of fiction, printed in a newspaper as news and copyrighted, was entitled to copyright protection against the use of a story in a drama, long after the publication. The Court held there was no copyright since the fiction was printed and offered to the public as news.

Tribune Company v. *A. P.* (116 F. 126) cited by petitioner (Brief pp. 56, 57, 58) is purely a copyright case and was so decided (and the case was urged before the Supreme Court in the *International News Service* case, 248 U. S. at pp. 217, 219). The first publication would of course terminate the common law copyright, but the Supreme Court in the *News Service* case emphatically states that the question before it was not a copyright question but a question of the right to protection during the very process of dissemination, which necessarily continued for some hours after the first technical publication. In the *Tribune* case no question of unfair competition or unjustified interference with another business was presented. Incidentally, the petitioner is mistaken in saying the defendant therein was the present complainant. The present complainant had not been organized at that time.

Atlantic Monthly Publishing Co. v. *Post Publishing Co.* (27 F. (2d) 556) cited by petitioner (Brief p. 61) held that the plaintiff was not entitled to an injunction since its right in an article by Alfred E. Smith had already terminated, *by the terms of the agreement with the plaintiff.*

Dodge Corporation v. *Comstock,* 251 N. Y. S. 172, cited by petitioner (Brief p. 60) is a case of the misappropriation of confidential news. The quotation by petitioner is a dictum and is from the dissenting opinion in the *International News Service* case when in the Circuit Court of Appeals. (245 F. 244, 253).

Assuming that there is a quasi property in fresh news during the period of its normal dissemination, as held by this Court in the *International News Service* case, it is apparent that the petitioner in the present case, under the allegations of the complaint, is guilty of a misappropriation of such property.

C. THE COMPLAINT STATES A CAUSE OF ACTION BASED ON DEFENDANT'S INTERFERENCE WITH A LAWFUL BUSINESS WITHOUT JUSTIFICATION.

We think the two preceding subheads establish complainant's right to injunctive relief, first, because the defendant is unfairly competing in the advertising and news fields, and, second, because defendant is infringing on what equity regards as a property right in news as between the parties. In view of the considerable discussion and argument which has arisen in the case with respect to the precise definition of competition and the precise boundaries of the property right in news after first publication, we think it is pertinent, although perhaps superfluous, to point out that the complainant's right to injunctive relief rests on a broader ground than unfair competition or a specific property right in news reports.

The basic right of complainant and its members is the right to carry on a lawful business without interference; and this right has consistently been held to be a property right such as to afford a basis for equity jurisdiction. The interference is not actionable if it is merely a consequence of defendant's proper exercise of his own rights; in other words, the interference must be without justification. But the defendant is bound to act in accordance with the maxim *sic utere tuo ut alienum non laedas.* The most frequent justification for interference with another's business is competition—and competition is of course a *prima facie* justification since favored by public policy. But competition is not a justification if it is unfair. This is the origin and the sustaining principle of the law of unfair competition.

Accordingly, the plaintiff's right to relief depends, first, on interference with his business, and, second, on lack of justification therefor on the part of the defendant. As far as the fact of interference with and damage to complainant's business is concerned, the present case is indistinguishable from the *International News Service* case, *supra*.

It follows that the matter of competition is relevant only in so far as it affects the defendant's justification for pirating complainant's news reports. Competition constitutes a *prima facie* justification, and renders it necessary for the complainant to show that the competition is unfair. As heretofore indicated, we think the defendant clearly has the *prima facie* justification of competition, but that this justification is defeated with equal clearness, by the unfairness of the competition. Even if it could be maintained that defendant was not competing with the complainant since it charged nothing to its listeners, this would have no effect except to deprive the defendant even of its *prima facie* justification, and would therefore put the defendant under the necessity of showing some other justification. Such a justification is in fact suggested in the claim that defendant is performing a public service; but before dealing with this alleged justification, we shall briefly refer to the authorities showing that the law of unfair competition is simply a phase of the broader law of unfair or unjustifiable interference with a lawful business. Referring to the business of making news known to the world, this Court said in the *International News Service* case, *supra*:

> "The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other. *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 254" (pp. 235-236).

> "* * * The right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already ac-

quired * * * It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition" (pp. 236-237).

"Stripped of all disguises, the process (of defendant in pirating news) amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not * * *" (p. 240).

This Court further emphasized the breadth of the ground on which its decision rested by its citation of the *Hitchman* case, *supra,* in which the defendant labor union appropriated no profits of the plaintiff but was enjoined from inducing the plaintiff's employees to join the union contrary to their agreement with the plaintiff. Again, in commenting on the principle that "palming off" is not essential to give a right of action, this Court said (pp. 241-242):

"But we cannot concede that the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's right is more direct and obvious * * * Instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation and sells complainant's goods as its own.

"Besides the misappropriation, there are elements of imitation, of false pretense, in defendant's practices * * * but these elements, although accentuating the wrong, are not the essence of it".

There are a great variety of cases holding that an unjustified or unfair interference with or injury to a lawful business is actionable, despite the absence of such conventional features as "passing off" and competition. Thus, the appropriation of a business system or the like is actionable, although there is no "passing off":

Fonotipia, Ltd., v. *Bradley,* 171 F. 951;
Meyer v. *Hurwitz,* 5 F. (2d) 370 (App. dis. 10 F. (2d) 1019);

Prest-O-Lite Co. v. *Davis*, 209 F. 917, Aff'd. 215 F. 349;

National Telephone Directory Company v. *Dawson Manufacturing Co.*, 214 Mo. App. 683 (263 S. W. 483).

In *Cheney Bros.* v. *Doris Silk Corporation*, 35 F. (2d) 279 (Cert. denied 281 U. S. 728), the Court refused to grant an injunction under circumstances which the present petitioner purports to find similar to those in the present case, but which are obviously radically different. The plaintiff there obtained annually at considerable cost a large number of silk patterns for the ensuing season. The defendant copied such patterns as proved to be popular and sold them without any passing off. The defendant asked an injunction against such copying of its patterns to apply for the duration of the season. The Court refused to extend the doctrine of the *International News Service* case to the case before it. The patterns in question were concededly not such as could be protected by copyright. We think the protection of silk patterns from copying or near-copying presents practical difficulties of an obvious nature which do not exist with respect to the protection of live news. Furthermore, while it might fairly be said that a substantial extension of the *International News Service* case would be necessary in order to cover the *Cheney Bros.* case, no real extension is necessary to cover the present case.

Petitioner refers to *Reichelderfer* v. *Quinn*, 287 U. S. 315, as confirming the limitation upon the scope of the *International News Service* case (Petition, pp. 18, 19). But the *Quinn* case merely held that adjoining owners acquired no right to have Rock Creek Park in Washington remain a park. This Court said (p. 319):

> "Beyond the traditional boundaries under common law only some imperative justification in policy will

lead the courts to recognize in old values new property rights. Cf. International News Service vs. Associated Press, 248 U. S. 215 with Cheney Bros. vs. Doris Silk Corporation 35 F. (2d) 279."

That this Court has not repudiated or limited the doctrine of the *International News Service* case is apparent from the *Schechter* case (295 U. S. 495, 531-2) in which this Court, in discussing the meaning of "Codes of Fair Competition", pointed out that the doctrine of unfair competition is not confined to cases of "palming off", but applies to "misappropriation as well as misrepresentation, to the selling of another's goods as one's own—to misappropriation of what equitably belongs to a competitor", citing the *International News Service* case.

In the following cases the unfairness consisted in an encroachment upon the plaintiff's good name or good will although there was no competition.

Peninsular Chemical Co. v. *Levinson*, 247 Fed. 658 (C. C. A. 6);
American Products Co. v. *American Products Co.*, 42 Fed. (2d) 488;
Vogue Company v. *Thompson-Hudson Co.*, 300 Fed. 509 (C. C. A. 6);
Wisconsin Electric Co. v. *Dumore*, 35 Fed. (2d) 555 (Cert. denied 282 U. S. 218);
Wall vs. *Rolls-Royce of America*, 4 Fed. (2d) 333;
Fox Company v. *Glynn*, 191 Mass. 344, 78 N. E. 89;
Walter Baker & Co. v. *Sanders*, 80 F. 889.

In *Borden's Ice Cream Co.* v. *Borden's Condensed Milk Co.*, 201 F. 510, cited in this connection by petitioner (Petition, p. 16), there was no competition since one party was selling ice cream (or about to sell ice cream) and the other milk; and the only question remaining, therefore, was whether the defendant was injuring the plaintiff by use of the name "Borden" in a non-competitive business. That such an injury may be actionable has been repeatedly held.

In the following cases the unfairness consisted in labor activities such as picketing and boycotting, which lacked

the justification of reasonable advancement of the defendant's own interests; and in these cases there was, of course, no competition, no passing off, and no appropriation of profits.

Steinert and Sons v. *Tagen*, 207 Mass. 394 (93 N. E. 584);
American Foundries v. *Tri-City Council*, 257 U. S. 184;
Casey v. *Cincinnati Typographical Union*, 45 Fed. 135;
Gray v. *Building Trades Counsel*, 91 Minn. 171 (97 N. W. 663).

In the following cases the unfairness consisted in libelous statements affecting the plaintiff's business.

Dehydro Inc. v. *Tretolite Co.*, 53 Fed. (2d) 273;
Farquhar Co. v. *National Harrow Co.*, 102 Fed. 714 (C. C. A.)

In *Davis* v. *New England Railway Publishing Co.*, 203 Mass. 470 (89 N. E. 565), the unfairness consisted in the wilful exclusion of plaintiff's name from a trade directory of reputable express companies. On demurrer, the Court held that the plaintiff was entitled to equitable relief on the ground that the exclusion of plaintiff's name constituted an unjustifiable injury to plaintiff's business. Obviously the defendant was not competing with the plaintiff, and, so far as appeared, he derived no profit from the exclusion of plaintiff's name.

In the following cases the unfairness consisted in the fact that the defendant's acts, although such as would be justifiable if they constituted genuine competition, were in fact unjustifiable because they constituted a merely simulated competition, the real purpose of which was to injure or destroy plaintiff's business.

Tuttle v. *Buck*, 107 Minn. 145 (119 N. W. 946);
Dunshee v. *Standard Oil Co.*, 152 Iowa 618 (132 N. W. 371), affd. 165 Iowa 625;

Boggs v. *Duncan-Schell Furniture Co.,* 163 Iowa 106 (143 N. W. 482).

A large number of cases involving unfair interference with lawful business are collected in Chapters 12 and 19 of Nims on Unfair Competition, Third Edition, the latter chapter being cited in the *Schechter* case, *supra.* The general question of interference with business as a cause of action, and the extent to which the defendant's furtherance of his own interests is a justification, were considered at length in *Mogul Steamship Co.* v. *McGregor,* 23 Q. B. D. 598, in which the Court said (p. 613):

> "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that person's property or trade, is actionable if done without just cause or excuse."

and see *Parkinson Co.* v. *Trades Council,* 154 Cal. 581 (98 Pac. 1027), and *Huskie* v. *Griffin,* 75 N. H. 345 (74 Atl. 595).

We think it is manifest that the doctrine of the foregoing cases demonstrates the right of the present complainant to injunctive relief. Regarded from the standpoint of unfair interference with complainant's business, it is obvious, in the first place, that there is an interference with plaintiff's business by the defendant. This is not a case where the *fact* of interference can be disputed by showing that defendant is not competing, is not "passing off", is not misleading the public or is deriving no profit. From an objective standpoint, the factual interference remains the same whether the defendant's activities are to be described as an appropriation, competition, or pure beneficence. Furthermore, the factual interference is of the same nature as the interference enjoined in the *International News Service* case, *supra.* In the second place, turning to the justification, the defendant is either competing or not competing with the complainant. If the defendant is competing, this furnishes a *prima facie* justification; but the justification is defeated because the defendant's activities in pirating and disseminating news constitute an unfairness of the same nature as that involved in the *In-*

ternational News Service case. If the defendant is not competing, then the unfairness remains, but without even the colorable justification of a competitive interest.

D. THE DEFENDANT'S INTERFERENCE WITH COMPLAINANT'S BUSINESS IS NOT JUSTIFIED BY ANY PUBLIC INTEREST.

Petitioner devotes considerable space to the matter of the public interest in the wide and rapid dissemination of news. As the Circuit Court of Appeals said in this connection (R. p. 562):

> "In its final analysis this argument of KVOS to sustain the dismissal rests on the proposition that the bill in International News Service v. Associated Press, supra, would have been dismissed by the Supreme Court if the International News Service's members then had had a much faster distribution of the pirated news and had relied entirely on advertising income from their papers."

There is no point in the discussion of this public interest unless it is assumed that respondent has some right which would be protected but for the alleged public interest. More specifically the issue comes down to this. Petitioner is obliged to concede that the Associated Press (and its members) are entitled, under the *International News Service* case, to the protection of their business of disseminating their gathered news as against a news agency which, acting as a middleman, distributes news pirated from the respondent to the direct disseminators of news; but petitioner contends that the public interest prevents the extension of this doctrine to the protection of the business against a direct disseminator himself (and it may be remarked that the petitioner claims to be, in part, a news gathering agency, as found by the Court below, R. p. 511).

The Circuit Court of Appeals in its opinion (R. p. 571) says:

> "So far as concerns the case against piracy presented by the bill, the speed of the radio's distribution of news makes the injury done the press in the performance of its business and civic activities the more effective and certain."

Public interest might be better served by competition in the independent gathering of news than by the pilfering by one news gatherer from another.

Petitioner discusses at some length the "German" case in which a newspaper, obtaining news of the Graf Zeppelin from the radio station's broadcast, thereafter published the news in a special issue of its paper and the Court refused to grant an injunction against such use of broadcast news (Petition pp. 12, 33-40, 50). That case is not controlling here because the dissemination of the news by the radio station which was the owner of the news had been completed when the newspaper had "lifted and published" the news, and hence it might well be argued that there was no encroachment upon the radio station's dissemination of the news. The German Court also based its reasoning in part upon the fact that news as such was not copyrightable in Germany; and recognized no distinction between the law of copyright and the law of unfair competition such as this Court definitely recognized in the *International News Service* case. Thus, the German Court would apparently have decided against The Associated Press in the *International News Service* situation on the ground that the Press, having no copyright, could have no other protection.

In this connection, it may be noted that petitioner urges (Brief pp. 13, 52) that the Courts should not grant relief because Congress refused to legislate upon this matter in 1884, and suggests that legislation is needed before the Court can grant the requested relief. Perhaps one reason against legislative protection is that equity can afford the necessary protection—and more flexibly according to the circumstances, and it may be added that the argument based on the bill before Congress in 1884 was unsuccessfully urged on this court in the *International News Service* case, 248 U. S. 215, 264, 265.

POINT IV.

The preliminary injunction was rightfully granted.

It is not altogether clear that petitioner even intends to bring the question of the preliminary injunction before this Court. Petitioner's statement of the scope of its argument (Brief, p. 29) seems to indicate that it does not. However, the brief and petition are full of references to matters not open to consideration on the motion to dismiss the bill, and perhaps we must therefore draw the inference that the petitioner means to attack the preliminary injunction should the bill of complaint be upheld.

The motion for a preliminary injunction was submitted on affidavits. Those in behalf of The Associated Press described one hundred eighty-two piratings by defendant petitioner in which appear one hundred fifty-three articles containing four hundred twenty-five identical paragraphs pirated by KVOS (R. pp. 73-465). Besides this there were twenty-seven broadcasts similar to the news items from which they were alleged to be rewritten.

The District Court held (R. p. 480) the showing as to "piracy" was clear and convincing. The Circuit Court of Appeals said (R. p. 575-579) that the record showed continued pirating. Since defendant petitioner refused to desist from its practice after repeated requests (R. p. 15, 28-30), the preliminary injunction was proper.

The Circuit Court of Appeals in its opinion (R. pp. 579, 580) compares the record here with that in the *International News* case on the preliminary injunction, saying

> "the preliminary injunction there granted was ordered sustained by the Supreme Court on a showing much less comprehensive and detailed than in the record here. Less than thirty instances of piracy are there described as compared with over five times that number here."

It appears, as pointed out by that Court (R., p. 577), that the piracies continued up to the time of the institution of this action. And as said in the opinion of the Circuit Court of Appeals (R. pp. 579, 580)

> "It appears, and it is not denied, that complainant's income from its distribution of its news to the papers serving KVOS' radio area is $6,000 per month, or $72,000 per annum. Since the thirty cases of piracy were sufficient to show a threatened damage warranting a preliminary injunction in the International case the one hundred fifty-three are sufficient here. The Supreme Court there, without evidence of the loss of a subscriber, took notice that such a practice threatened harm to the circulation of the association's member papers requiring injunctive relief. We take similar notice here that such pirating may well affect both their subscriber and advertising income."

In an attempt to show that the occasion for an injunction is trivial, the petitioner asserts that its station has "at the most" a range limited within "a five-mile radius" (Petition, p. 1). There is no foundation in the record for this amazing statement. Quite to the contrary, petitioner's own affiant, L. H. Darwin, states under oath that the petitioner's "Newspaper of the Air" (Tr., p. 66):

> "* * * reaches a greater audience than any newspaper could do so, in that the people on farms in the Counties of Whatcom, Skagit, San Juan, Snohomish and Island depend almost exclusively upon this informative news service for information on news and political events * * *"

It will be seen, from any standard atlas, that the nearest point in Snohomish County is more than thirty miles from Bellingham, while the furthest point is more than ninety miles away.

CONCLUSION.

Respondent submits that the decision of the Circuit Court of Appeals was correct and in accord with the weight of authority, and that there is an entire absence of any of the requisite reasons for awarding a writ of certiorari. The writ should be denied.

Respectfully submitted,

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